No. 80-599

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In the Supreme Court of the United States

OCTOBER TERM, 1980

GARLAND P. JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the joint representation of petitioner and his co-defendants by the same attorney denied petitioner the effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1980. A petition for rehearing was denied on August 12, 1980. The petition for a writ of certiorari was filed on October 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of engaging in a continuing criminal narcotics enterprise, in violation of 21 U.S.C. 848. He was sentenced to life imprisonment and fined $100,000. The court of appeals affirmed, 532 F.2d 1101 (1976). This Court granted certiorari, affirmed the judgment in part, and vacated it in part. 432 U.S. 137 (1977). Petitioner thereafter filed the instant motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

1. On March 18, 1974, petitioner and nine other individuals were charged in a one count indictment with conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846. A second indictment charged petitioner alone with conducting a continuing criminal narcotics enterprise, in violation of 21 U.S.C. 848. The government thereafter filed a motion

to consolidate the indictments for trial. Petitioner and his nine co-defendants in the conspiracy case, through their common counsel, filed a joint objection to the government's motion. The district court denied the government's motion and ordered that the charges be tried separately. In the ensuing trial of the Section 846 charge, petitioner and six of his co-defendants were convicted of conspiracy. The court of appeals affirmed petitioner's conviction, 520 F.2d 1256 (7th Cir. 1975), and this Court denied certiorari, 423 U.S. 1066 (1976).[1]

2. Prior to his separate trial on the continuing criminal enterprise charge, petitioner, through newly appointed counsel, filed a motion to dismiss the indictment, claiming that trial on that charge was barred by his conviction of the lesser-included offense of conspiracy to distribute narcotics. The district court denied this motion. Petitioner was thereafter tried and convicted of engaging in a continuing criminal enterprise. He was sentenced to life imprisonment and fined $100,000, both to run consecutively to the 15-year sentence and $25,000 fine previously imposed in the conspiracy case. The court of appeals affirmed the conviction, 532 F.2d 1101 (7th Cir. 1976), holding that although a narcotics conspiracy is a lesser-included offense of conducting a continuing

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[1] In that appeal, petitioner claimed that his trial counsel had been ineffective because of his failure to cross-examine a former client who testified as a government witness. Following the affirmance of their conspiracy convictions, petitioner and his co-defendants filed a motion under 28 U.S.C. 2255 for post-conviction relief, again claiming that they had been denied the effective assistance of counsel. The district court denied the motion, the court of appeals affirmed, 544 F.2d 523 (1976), and this Court again denied certiorari, 430 U.S. 935 (1977).

criminal enterprise, this Court's decision in *Iannelli* v. *United States*, 420 U.S. 770 (1975), created an exception to the double jeopardy rule in the case of complex statutory crimes, allowing for separate punishment on both the greater and lesser offenses if Congress so intended.

This Court granted certiorari. 429 U.S. 815 (1976). In a plurality opinion, four Members of the Court, while assuming that conspiracy under 21 U.S.C. 846 is a lesser-included offense of conducting a continuing criminal enterprise under 21 U.S.C. 848, concluded that the Double Jeopardy Clause nevertheless did not bar petitioner's trial for the latter offense because petitioner "was solely responsible for the successive prosecutions for the conspiracy offense and the continuing criminal-enterprise offense." 432 U.S. 137, 154 (1977). The plurality opinion also concluded, however, that because Congress did not intend to impose cumulative punishments under Sections 846 and 848, the district court had no power to impose on petitioner a fine greater than the maximum permitted by Section 848. 432 U.S. at 158; see also *id.* at 160 (opinion of Stevens, J.). Mr. Justice White concurred in the judgment to the extent it affirmed petitioner's conviction on the continuing criminal enterprise charge but dissented from the Court's conclusion that multiple punishments were not authorized.

3. On October 21, 1977, petitioner filed a motion under 28 U.S.C. 2255, claiming that he had not "waived" his protection against double jeopardy, that he had been denied effective assistance of counsel, and that the district court and the prosecutor erred in failing to advise him of the consequences of his opposition to the government's motion to try the con-

spiracy and continuing criminal enterprise charges together. The district court rejected these claims (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner contends (Pet. 5-7) that he was denied his Sixth Amendment right to the effective assistance of counsel because his attorney at the conspiracy trial was representing several clients with conflicting interests and because the trial court failed to advise him of the dangers of multiple representation and his right to separate counsel. In particular, petitioner claims that his attorney's decision to oppose the government's motion to consolidate the conspiracy and continuing criminal enterprise trials was made for the benefit of his co-defendants, and to petitioner's detriment. This contention is without merit.

Petitioner's reliance on *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), for his claim of ineffective assistance of counsel, is misplaced. The Court in *Holloway*, while recognizing that joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel" (435 U.S. at 482), held that the trial judge should have given greater weight to claims by defense counsel that his representation of several co-defendants created a conflict of interest. The Court pointed out that the possibility of a conflict had been raised by formal objections, motions, and defense counsel's representation (*id.* at 487). Defense counsel in the instant case made no such representations. This is not a case, therefore, where the trial court disregarded representations by defense counsel that he could not properly present his case because of a conflict of interest between his

clients. Nor, contrary to petitioner's apparent assertion (Pet. 5-6), was the district court constitutionally required to inquire, *sua sponte*, into the possibility of a conflict of interest in the joint representation of petitioner and his co-defendants at the conspiracy trial. *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980).[2] Therefore, because separate counsel was not requested at trial, petitioner must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Slip op. 13.

In the present case, petitioner has failed even to establish that his attorney was laboring under a conflict of interest, much less that such a conflict ad-

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[2] Petitioner argues that there is a conflict between the First and Seventh Circuits regarding the duty of a court *sua sponte* to make an inquiry of jointly represented defendants concerning conflicts of interest. However, the panel decision in *United States* v. *Martorano*, 610 F.2d 36 (1st Cir. 1979), which petitioner asserts is in conflict with the Seventh Circuit's decision in the instant case, was based on an exercise of the court's supervisory powers (*id.* at 41), not the Constitution. That decision, moreover, has been vacated by the First Circuit, sitting en banc. 620 F.2d 912 (1980). Under the en banc decision, reversal of a conviction is appropriate only where the defendant has been prejudiced by the multiple representation. As we show below (pages 5-7, *infra*), petitioner has failed to demonstrate that he was prejudiced by the multiple representation.

We further note that any disagreement among the circuits regarding the exercise of their supervisory powers to require a trial court to inquire about a possible conflict of interest will be resolved by Fed. R. Crim. P. 44(c), which became effective on Dec. 1, 1980. See Pub. L. No. 95-42, 93 Stat. 326. That ~~proposed~~ rule states that in cases of joint representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." Review of the supervisory power question therefore is not warranted at the present time.

versely affected his lawyer's performance. The sole basis for petitioner's claim of conflict centers on his attorney's decision to oppose the government's motion to consolidate the conspiracy and continuing criminal enterprise trials. The record shows, however, that defense counsel's decision to oppose the consolidation motion sprang as much from concerns over petitioner's interests as from concerns over the interests of his co-defendants. As this Court stated (432 U.S. at 142 n.5 (citations omitted)):

> [T]he memorandum supporting the defendants' motion took pains to point out which objections to trial together were relevant to Jeffers alone. * * *. Indeed, the last argument before the conclusion stated:
>
> "It is likely that much of the evidence which will be presented in the conspiracy trial does not 'directly' inculpate the defendant, GARLAND JEFFERS, and would, therefore, be inadmissible against him in the 'continuing criminal enterprise' indictment unless a direct link could be established. All of the said overt acts would, however, be admissible, or at least arguably so, in the conspiracy trial. The prejudice to the defendant, JEFFERS, is therefore, imminent and clear."
>
> In addition to the arguments relating specifically to Jeffers, the memorandum contained a number of points designed to apply equally to all defendants. We see no reason to read it as implicitly excluding Jeffers.

Thus, to a significant degree, the interests of petitioner and his co-defendants were in concert, not in conflict. In any event, to the extent that petitioner's interests may have been in conflict with those of his

co-defendants because of the possible double jeopardy issue affecting petitioner's interests alone, petitioner has not shown that his lawyer's performance was adversely affected—*i.e.*, that the lawyer would have handled things differently but for the asserted conflict. *Cuyler* v. *Sullivan*, *supra*, slip op. 14-15.[3] As the court of appeals correctly stated (Pet. App. 4), "[w]here * * * an allegedly detrimental decision was made upon considerations which would have influenced even wholly independent counsel, the defendant has not been denied effective assistance of counsel simply because his attorney represented multiple defendants."[4]

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[3] Indeed, petitioner's lawyer appears to have been unaware of the double jeopardy issue affecting petitioner (432 U.S. at 159-160 (opinion of Stevens, J.)), and, therefore, of the possible divergence of interests. If the lawyer was unaware of the supposed conflict of interest, his performance could not have been adversely affected by it.

[4] Citing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), petitioner claims (Pet. 7) that by opposing the government's consolidation motion, his attorney "could not thereby effect a waiver of [petitioner's] fundamental constitutional right against double jeopardy, without a record of his voluntary, knowing and intelligent acquiescence." This claim is similar to the claim made by respondent in *United States* v. *Dinitz*, 424 U.S. 600 (1976), that his mistrial motion constituted a waiver of his right not to be placed twice in jeopardy and that to be valid the waiver had to meet the standards set forth in *Johnson* v. *Zerbst*, *supra*. The Court disposed of this claim, stating (424 U.S. at 609 n.11):

> This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional pro-

Moreover, despite his contrary assertions (Pet. 6-7), petitioner can show no continuing prejudice caused by his attorney's decision to oppose the consolidation motion. Had his attorney acquiesced in the motion, petitioner would have been tried at a joint trial on charges of conspiracy and engaging in a continuing criminal enterprise. Because, as petitioner's subsequent trial and conviction made clear, the evidence was sufficient to support a conviction under 21 U.S.C. 848, it makes little difference, apart from petitioner's desire to escape punishment for that serious offense, whether that conviction resulted from a joint trial or from a subsequent trial on the continuing criminal enterprise charge alone. And, "[s]ince the Government had the right to try petitioner on the [continuing criminal enterprise indictment], the court had the power to sentence him to whatever penalty was authorized by that statute." 432 U.S. at 157. Further, petitioner does not suffer from multiple punishment resulting from the successive trials; he is serving only the sentence based on the continuing criminal enterprise conviction. *Id.* at 154-158; *id.* at 160 (opinion of Stevens, J.).

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hibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right.

We see no reason why the same principle would not apply in the present case.

It also is not clear what relief properly could be ordered if a conflict of interest were shown to have adversely affected the lawyer's performance. A retrial on the continuing criminal enterprise indictment would certainly not remedy the only injury petitioner can claim to have resulted from the supposed conflict—his being forced to go to trial a second time. Conversely, to dismiss the continuing criminal enterprise indictment because of the alleged conflict would, in effect, be to allow petitioner successfully to relitigate the double jeopardy claim this Court rejected in its prior review of petitioner's conviction, merely because petitioner has recast that claim in terms of ineffective assistance of counsel. Dismissal of the indictment would also unfairly allow petitioner permanently to avoid the substantial punishment imposed on the basis of an otherwise valid conviction on the continuing criminal enterprise charge even though neither the court nor the prosecution was responsible for the asserted constitutional violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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